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No. 83-1615

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL O'ROURKE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service abused its discretion in denying relief from deportation in light of petitioner's claim that his offenses in Ireland were "purely political offenses" under the exclusion provisions of 8 U.S.C. 1182(a)(9) and (10).

2. Whether the immigration judge erred in denying petitioner's request for discovery and a hearing on the issue of the recusal of the preceding immigration judge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unreported. The opinions of the Board of Immigration Appeals (Pet. Supp. App. A34-A54) and the immigration judge (Pet. Supp. App. A1-A33) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1984. The petition for a writ of certiorari was filed on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Republic of Ireland. By 1972, he was a full-time member

of the Provisional Irish Republican Army (PIRA).[1] His duties included directing research and development in the production of ordnance, incendiaries, and grenades (R. 1043), supervising bomb factories in the Republic of Ireland (R. 955-956), and training other individuals in the use of explosives (R. 965). The explosive devices were produced for use against both the British forces in Northern Ireland (R. 964-965) and what petitioner characterized as "economic" or "non-military" targets in Northern Ireland (R. 1022, 1046). As the Board of Immigration Appeals summarized the record (Pet. Supp. App. A50), petitioner's "activities were the manufacture and supply of explosives to be used for terrorism."

In July 1975, petitioner was convicted twice in the Republic of Ireland for the illegal possession of firearms and explosives (R. 1704-1707, 1734-1739). The first conviction, involving the possession of explosive substances under suspicious circumstances (R. 2079-2081) and the unlawful and malicious possession of firearms with intent to enable any other person to endanger life or cause serious injury to property (R. 2082), was based on petitioner's supervision of a bomb factory operated under the cover of a com-

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[1] The Provisional Irish Republican Army was formed in approximately 1970 when the remnant of the Irish Republican Army (IRA) split into an "Official" and a "Provisional" wing. See, *e.g.*, P. Johnson, *Ireland* 222 (1981) (R. 992). As conceded by petitioner in his appeal to the court below (Petitioner's Corrected Opening Br. 40-41), the salient characteristic of the PIRA has been its unyielding commitment to violence, and it is generally considered to be a "clandestine, terroristic organization." *McMullen* v. *INS*, 658 F.2d 1312, 1318 (9th Cir. 1981).

pany he had established. His subsequent conviction, also for the illegal possession of firearms and explosives (R. 1707, 1734, 1735), related to a second bomb factory at his father's residence (R. 956-958). Petitioner received concurrent sentences of six years' imprisonment (R. 1704-1739).

In July 1976, petitioner and other prisoners escaped from custody by detonating explosives in a Dublin courthouse where they had been summoned as witnesses (R. 981-983). Petitioner served as the engineering officer in the escape (R. 982).

Following his escape, petitioner returned to the PIRA and worked with one of the "active service unit[s]," the "prime offensive arm" of the PIRA (R. 764, 1978). Shortly after petitioner's escape, the PIRA murdered the British ambassador to Dublin with an explosive device; petitioner stated that he was sought by the Irish police in connection with the murder (R. 989-991). According to petitioner, this led him to leave the Republic of Ireland (R. 990).[2] Petitioner testified during his deportation proceeding that he was opposed to leaving Ireland and that his "mind was on going back" (R. 990, 1011, 1014).

2. On or about November 29, 1977, petitioner applied for a visitor's visa at the United States Embassy in Dublin. In making this application he used the false identity of Patrick Mannion and presented an Irish passport in that name (R. 1077, 1081).[3]

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[2] However, petitioner did not leave the Republic of Ireland until 19 months after the murder, and three months after he obtained a visa.

[3] Section 222(c) of the Immigration and Nationality Act, 8 U.S.C. 1202(c), requires each applicant for a non-immigrant visa to "state his full and *true* name, the date and place of birth, his nationality [and] the purpose and length of his in-

Petitioner departed for the United States three months later and was admitted under the assumed name of "Mannion"; upon inspection by immigration authorities, petitioner did not disclose his true identity or fugitive status (R. 1012-1013). See 8 U.S.C. 1225. Under the fraudulently obtained visa, petitioner's authorized stay was for approximately three weeks (R. 1810). See 8 U.S.C. 1184.

Upon his arrival in the United States, petitioner began working on a full-time basis (R. 1003-1004), which violated the prohibition against employment by visitor aliens. See 8 C.F.R. 214.1(c) (1979); *Ghorbani* v. *INS*, 686 F.2d 784, 786 (9th Cir. 1982). In addition, petitioner never resided at the address that he had provided to United States authorities at the time of his entry (R. 1001); instead, he stayed with Daniel Cahalane, who was petitioner's principal employer until Cahalane was convicted of federal offenses relating to the illegal export of weapons to Northern Ireland (R. 1003-1004). Furthermore, petitioner never registered his current address as required by Section 265 of the Act, 8 U.S.C. 1305. Finally, petitioner failed to depart at the end of the stay authorized by his fraudulently obtained visa and did not seek any extensions; rather, petitioner scratched out the notation "three week visit" placed on his passport by the American Embassy in Dublin (R. 1003).[4]

On October 30, 1979, petitioner was arrested by INS agents (R. 1527-1528). During the 19-month period between his entry and arrest, petitioner neither

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tended stay" (emphasis added). Petitioner's attorney conceded at the deportation proceeding that there was "some crime committed here in entry" (R. 1598).

[4] 18 U.S.C. 1546 makes such action a criminal offense.

filed a claim for asylum nor sought adjustment of his immigration status.

3. a. Following petitioner's arrest, deportation proceedings were commenced against him. At the first several deportation hearings petitioner refused to identify himself (*e.g.*, R. 1303-1309, 1467) but, in light of extensive INS evidence establishing his true name, petitioner finally admitted his identity and described how he had entered the United States under the alias "Patrick Mannion" (R. 1076-1078, 1080-1084).

As amended, the charges against petitioner alleged that he was subject to deportation under Section 241 (a)(2) of the Act, 8 U.S.C. 1251(a)(2), for overstaying his visitor's visa, for failing to show the time, place, and manner of his entry (see 8 U.S.C. 1361 and 8 C.F.R. 242.16(d)), and for entering the United States without inspection, and under Section 241(a)(5) of the Act, 8 U.S.C. 1251(a)(5), for failing to register with the INS. Petitioner conceded that he was deportable on the ground of overstaying his visa (R. 1110-1111, 1113). When petitioner declined to select a country to which he wished to be sent if deportation were ordered, Immigration Judge Hupp designated the Republic of Ireland (R. 893). See 8 C.F.R. 242.17(c).

At the hearing of June 17, 1980, petitioner submitted an application for adjustment of his immigration status to lawful permanent resident alien under Section 245 of the Act, 8 U.S.C. 1255, on the ground that he had entered into a contract of common-law marriage with a United States citizen in July 1979 (R. 1115, 1757-1758).[5] Section 245 authorizes the

[5] At the same time an immediate relative visa petition was submitted by petitioner's common-law wife. The matter was

INS, in its discretion, to adjust the immigration status of an alien who demonstrates that he is legally eligible for such relief, including, inter alia, that he is admissible to the United States and not excludable on any of the grounds specified in Section 212(a) of the Act, 8 U.S.C. 1182(a). See, *e.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978); *INS* v. *Bagamasbad*, 429 U.S. 24, 24, 26 (1976); 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* §§ 7.3, 7.7 (rev. ed. 1984). Because petitioner's convictions in the Republic of Ireland and his fraudulent entry into the United States were grounds for exclusion under Section 212(a)(9), (10) and (19) of the Act, 8 U.S.C. 1182(a)(9), (10) and (19), his application for adjustment of status was later supplemented (R. 899, 1781) by an application for discretionary waiver of exclusion pursuant to Section 212(h) and (i) of the Act, 8 U.S.C. 1182(h) and (i). In addition, petitioner eventually sought (R. 732-733, 874-875, 877, 894, 1951-1958) political asylum (Section 208, 8 U.S.C. 1158) and withholding of deportation (Section 243(h), 8 U.S.C. 1253(h)) based on his claim of persecution in the Republic of Ireland. Finally, petitioner filed an application for voluntary departure under Section 244(e) of the Act, 8 U.S.C. 1254(e), and indicated that he would return to Ireland if his application were granted (R. 539); alter-

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remanded to the INS District Director for adjudication of the visa petition (R. 1116-1118). In January 1981, the District Director denied the petition (R. 313-314). Petitioner appealed to the Board of Immigration Appeals, which in April 1981 determined that petitioner was the spouse of a United States citizen and approved the immediate relative visa petition (R. 1771-1775). Thereafter, petitioner's deportation hearing resumed to consider his application for adjustment of status.

natively, petitioner designated Sweden as the country of deportation in the event voluntary departure were denied (see Section 243(a), 8 U.S.C. 1253(a)).

b. On June 4, 1981, Immigration Judge Hupp sua sponte entered an order recusing himself from further proceedings on the ground that he was no longer "able to make an objective and impartial decision" (R. 1905).[6] In accordance with 8 C.F.R. 103.1(f) and 242.8(b), the Acting Chief Immigration Judge assigned Judge Lyons to hear the case.

Petitioner's hearing resumed on June 29, 1981. At the commencement of the hearing, Judge Lyons answered questions from petitioner's counsel about his selection as a replacement for Judge Hupp. He denied petitioner's oral request for discovery on the matter of Judge Hupp's voluntary recusal, ruling that petitioner's claims about the recusal were irrelevant to the issues in the ongoing deportation proceeding (R. 793). Judge Lyons also denied petitioner's motion to have the case reheard from the beginning (R. 787-795) and completed the proceeding in accordance with 8 C.F.R. 242.8(b). See *Pereira-Diaz* v. *INS*, 551 F.2d 1149, 1154 (9th Cir. 1977).

The June 29 hearing was adjourned in response to petitioner's request for 30 days within which to present additional evidence (R. 875-879). Petitioner resumed presentation of his case on October 22, 1981. He again took the stand to testify in support of his

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[6] Judge Hupp's recusal was based on the fact that he had been under surveillance by agents of the INS Office of Professional Responsibility. INS affidavits submitted below indicated that this investigation of Judge Hupp was unrelated to petitioner's deportation proceeding (R. 161-166, 175-182, 1905).

application for political asylum and reiterated much of his testimony before Judge Hupp about his work with the PIRA (R. 734-780). Petitioner expressed concern about being returned to Ireland to serve the remainder of his sentence and to be prosecuted for his escape (R. 766-768), but he made no claim that he had been mistreated while in prison in that country.

4. The immigration judge found that petitioner was deportable under Section 241(a)(2) for overstaying his visa and under Section 241(a)(5) for failing to register with the INS (Pet. Supp. App. A2-A4). In addition, he denied petitioner's requests for relief from deportation.

With respect to an adjustment of status, the immigration judge rejected petitioner's application on two grounds. First, he concluded that petitioner was excludable in light of his convictions in Ireland (see Section 212(a)(9) and (10), 8 U.S.C. 1182(a)(9) and (10)), finding that petitioner's offenses were not "purely political offenses" within the meaning of the Act (Pet. Supp. App. A16-A27). As the judge explained (*id.* at A27 (footnotes omitted)):

> Here [petitioner] was not a part of an organized, identifiable, discrete force openly at war with [the Republic of Ireland]. At best he was a member of a clandestine secret group, whose energies were directed against the authorities of Northern Ireland, not the Republic whose laws he violated. As such I conclude that the offenses for which he was convicted were for [a]cts of a criminal nature which were not "purely political" within the meaning of Section 212(a)(9) or 212(a)(10). The same acts performed in the United States in relation to arms and explosives would also be criminal even if carried out for the same purpose.

Furthermore, the judge held that petitioner was not entitled to discretionary waiver of excludability pursuant to Section 212(h) of the Act, 8 U.S.C. 1182(h), because he had not satisfied the statutory requirement of showing "extreme hardship to his wife. * * * [T]here is no demonstrated hardship to the citizen spouse in this case" (Pet. Supp. App. A10, A12). Accordingly, the judge ruled that petitioner did not meet the standards in the Act for admissibility to the United States and therefore was not legally eligible for an adjustment of status.

Second, the immigration judge held that, apart from petitioner's ineligibility on legal grounds, an adjustment of status would be denied in the exercise of discretion. After summarizing petitioner's escape from Ireland and his illegal entry into the United States (Pet. Supp. App. A15-A16), the judge found that (*id.* at A16)

> even if [petitioner] were not inadmissible under Section 212(a)(9) o[r] (10) because of the claimed political nature of his criminal activities, his immigration record involving conscious, willful deception and fraud would argue against any discretionary grant of the extraordinary relief of adjustment of status * * *. On that basis the record does not justify a grant of adjustment of status under Section 245.

The judge emphasized that this "conclusion [denying adjustment of status as a matter of discretion] stands on its own without reaching" the issue of petitioner's excludability for his convictions in Ireland and his claim that those convictions were for "political crimes" (*ibid.*).[7]

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[7] For the same reasons that he denied the adjustment of status, the judge also declined to grant a discretionary waiver

The immigration judge also rejected petitioner's other claims for relief from deportation. He denied petitioner's application for political asylum under Section 208 of the Act, 8 U.S.C. 1158, and for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h),[8] on the ground that petitioner had not met his burden of proof to demonstrate a well-founded fear of persecution in the Republic of Ireland (Pet. Supp. App. A27-A30). The judge further denied petitioner's request for voluntary departure (*id.* at A30).

5. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal from the decision of the immigration judge (Pet. Supp. App. A34-A54). Based on its "independent review of the evidence" (*id.* at A53)[9] in the "extensive record" in the case (*id.* at A40), the BIA "agree[d] with the immigration judge's conclusion that [petitioner] is undeserving of discretionary relief from deportation" (*id.* at

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under Section 212(i) of the Act, 8 U.S.C. 1182(i), to relieve petitioner of the legal bar to admissibility (and hence to adjustment of status) based on his fraudulent entry into the United States (Pet. Supp. App. A8, A12-A16).

[8] Political asylum is a form of discretionary relief, eligibility for which is based upon a well-founded fear of persecution in the alien's native land. See Sections 208 and 101(a)(42)(A), 8 U.S.C. 1158 and 1101(a)(42)(A); 8 C.F.R. 208.1 *et seq.* By contrast, withholding of deportation is based upon persecution in the country to which an alien would be deported and is not discretionary once the applicant meets his burden of proof on the statutory requirements. See Section 243(h), 8 U.S.C. 1253(h); *In re Salim*, Interim Dec. No. 2922 (BIA Sept. 29, 1982).

[9] See also *Woodby* v. *INS*, 385 U.S. 276, 278 n.2 (1966).

A40-A41). Accordingly, the BIA did not reach the issue of petitioner's statutory eligibility for such relief (*id.* at A39-A41). See *INS* v. *Bagamasbad*, 429 U.S. 24 (1976).[10]

The BIA concluded that, in the exercise of discretion, petitioner should not be granted an adjustment of status (Pet. Supp. App. A41-A45). While recognizing that petitioner's marriage to a United States citizen is a "significant discretionary factor in his favor" (*id.* at A43), the Board held that, based on "all the facts and circumstances involved" (*id.* at A42), this consideration "is far outweighed by the extremely serious negative discretionary factors" against petitioner (*id.* at A44). As the Board explained (*id.* at A44-A45 (footnote and citations omitted)):

> [Petitioner] admits his involvement with the manufacture of explosives to be used for terrorism. He hedged when asked to disavow indiscriminate political violence. He escaped from prison by using explosives, and fraudulently obtained a United States visa using an alias. He continued to conceal his identity until it was no longer possible. Moreover, his spouse was well aware that [petitioner] was an escapee from an Irish prison, here illegally. Subsequent to the marriage the couple lived separately without her receiving any financial support. His admission into the United States would be detrimental to

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[10] For this reason, the Board did not address petitioner's excludability under Section 212(a)(9), (10) and (19) of the Act, 8 U.S.C. 1182(a)(9), (10) and (19), or his claim to waiver of excludability under Section 212(h) and (i) of the Act, 8 U.S.C. 1182(h) and (i).

> our relations with both the Republic of Ireland and Great Britain.[11]

In light of these concerns, the BIA "conclude[d] that [petitioner] does not merit the favorable exercise of discretion. The immigration judge properly denied the discretionary applications for adjustment relief" (*id.* at A45). And for the same reasons, it found that petitioner's "conduct has been so reprehensible so as to also warrant the discretionary denial of asylum and voluntary departure in lieu of deportation" (*ibid.*).

The BIA also upheld the denial of petitioner's request for withholding of deportation (Pet. Supp. App. A45-A52). Although withholding of deportation is not a discretionary form of relief (*id.* at A46; see page 10 note 8, *supra*), the Board "conclude[d] that [petitioner] has not established a well-founded fear of persecution on account of his political opinion. He has failed to establish that his possible prosecution by the Republic of Ireland would be for poli-

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[11] At petitioner's deportation hearing, an official spokesman for the Department of State testified that the

> national interests of the United States would be concerned with the adjustment of anyone's status who had a past history in which he participated in the support of acts of terrorism or carried on acts of terrorism.

R. 811. In response to inquiry concerning the effect of an adjustment of petitioner's status upon the foreign relations of the United States, the official expressed the view of the Department of State that the grant of such relief would adversely affect the credibility of our position on terrorism in the international community (R. 812-813). On cross-examination, the official testified that petitioner's convictions would be regarded as common crimes "because of the indiscriminate nature of the weaponry this man was constructing" (R. 852).

tical reasons rather than for his criminal conduct" (*id.* at A47). The Board explained (*id.* at A50) that petitioner's

> activities were the manufacture and supply of explosives to be used for terrorism. His political motivation alone does not justify his terrorist methods. Also, [petitioner's] crimes were committed in the Republic of Ireland, not in Northern Ireland. They are more like those of an anarchist, even if politically motivated.

Noting that "[t]he terrorist use of explosives has been universally condemned as atrocious in nature" (Pet. Supp. App. A47), the Board determined that "[t]he Republic of Ireland's prosecution of [petitioner] for his terrorist activities is a legitimate attempt to protect its citizens from the dangers caused by [petitioner's] criminal activities. * * * Such prosecution would not be persecution" (*id.* at A50, A52).[12]

Finally, the BIA rejected petitioner's various challenges to the deportation proceeding (Pet. Supp. App. A52-A54). In particular, the Board concluded that petitioner's claims concerning the recusal of Judge Hupp were "neither supported by the record nor any longer relevant, because of our independent review of the evidence on appeal. * * * There is also extensive evidence in the record supporting * * * [Judge Lyons'] conclusions" (*id.* at A53).

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[12] The absence of a well-founded fear of persecution also provided an alternative basis for affirming the denial of petitioner's application for asylum (Pet. Supp. App. A51, A52).

The BIA emphasized that its rejection of petitioner's claim of persecution "is the same whether we apply a standard of 'clear probability,' 'good reason,' or 'realistic likelihood' " (Pet. Supp. App. A51). Accordingly, the outcome in *INS* v. *Stevic* No. 82-973 (argued Dec. 6, 1983), will not affect this case and the petition need not be held pending the decision in *Stevic*.

6. The court of appeals affirmed in an unpublished decision (Pet. App. A1-A10). Noting that adjustment of status, asylum, and voluntary departure "are committed to the discretion" of the INS (*id.* at A3), the court found "no abuse of discretion in this case" (*ibid.*):

> Petitioner entered the United States by using a false name and a false passport. In order to obtain a visa, he lied not only about his identity, but also about his purpose in coming to this country. He overstayed the time permitted under the visa that he had obtained by misrepresentation. During the early stages of his deportation proceedings he refused to cooperate, even to the extent of revealing his true identity. These acts support the denial of discretionary relief.

Id. at A3-A4. The court also rejected petitioner's argument "that the BIA erred in failing to consider whether his crimes in the Republic of Ireland were political offenses" and "that, unless the BIA first determined that his crimes were nonpolitical, they could not consider the crimes as a factor in deciding whether to grant adjustment" (*id.* at A5); the court concluded that "insofar as they relate to the Republic of Ireland, petitioner's crimes were not political" (*id.* at A5-A6), and that his argument was without merit in any event because it "overlooks the many factors other than [his] convictions which warranted an exercise of discretion adverse to petitioner" (*id.* at A6).

In addition, the court of appeals affirmed the denial of petitioner's request for withholding of deportation (Pet. App. A6-A10). Applying its decision in *Stevic* v. *Sava*, 678 F.2d 401 (2d Cir. 1982),

cert. granted, No. 82-973 (Feb. 28, 1983),[13] the court held that petitioner's "vague and general claims" (Pet. App. A6) did not establish "a well-founded fear of [political] persecution" (*ibid.*),[14] and it rejected his contention that "his offenses were political and that punishment for them would be persecution" (*id.* at A8):

> The Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes. The illegal possession of explosives and firearms presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be. The nonpolitical nature of the Irish Government's interest and the serious nature of the crime removes prosecution and punishment for these offenses from the realms of political persecution. * * * The Republic of Ireland also has a valid nonpolitical interest in prosecuting those who escape from prison, particularly when explosives are used to accomplish the escape.

Id. at A8-A9.

Finally, the court of appeals rejected "[p]etitioner's due process claims arising out of Judge Hupp's decision to recuse himself," finding them to be "so lacking in substance as to merit no discussion" (Pet. App. A10).

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[13] See page 13 note 12, *supra*.

[14] As the court pointed out (Pet. App. A7), "[t]he very fact that [petitioner] was willing to remain in the Republic of Ireland for a year or so after first learning of the alleged threat and that he had expressed the intent to return to his homeland belies the existence of even subjective fear."

ARGUMENT

1. Petitioner's principal contention (Pet. 11-18) is that his crimes in the Republic of Ireland were "purely political offenses" within the meaning of the excludability provisions of Section 212(a)(9) and (10) of the Act, 8 U.S.C. 1182(a)(9) and (10), and therefore, because those crimes would not be grounds to exclude him from the United States, they could not be considered in deciding whether to grant him discretionary relief from deportation. This contention is without merit and does not warrant further review.

a. Petitioner's argument rests on a fundamental misunderstanding of the Immigration and Nationality Act. The denial of petitioner's applications for discretionary relief [15] was based on the INS's exer-

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[15] Petitioner sought an adjustment of status under Section 245, 8 U.S.C. 1255; asylum under Section 208, 8 U.S.C. 1158; and voluntary departure under Section 244(e), 8 U.S.C. 1254(e). In addition, petitioner requested a discretionary waiver of the grounds for exclusion that rendered him legally ineligible for an adjustment of status (see Section 212(h) and (i), 8 U.S.C. 1182(h) and (i)); however, because the Board of Immigration Appeals denied an adjustment of his status as a matter of discretion and did not rely on his legal ineligibility for such relief, petitioner's application for a waiver of excludability is no longer relevant.

Petitioner also sought withholding of deportation under Section 243(h), 8 U.S.C. 1253(h). Withholding of deportation is not discretionary once the alien has established his statutory eligibility (see page 10 note 8, *supra*). Because petitioner has limited his argument in this Court to the denial of discretionary relief (see Pet. i, 18), and because he has not challenged the determination below that he failed to establish a well-founded fear of persecution (which is the substantive standard for withholding of deportation), his claim for this relief is not now at issue. In any event, for the reasons stated by the immigration judge (see page 10,

cise of discretion, not on petitioner's ineligibility for such relief as a matter of law. The "purely political offense" provisions in Section 212(a)(9) and (10) on which petitioner relies (Pet. i, 12) simply establish an exception to the general exclusion of aliens who have been convicted of crimes. In turn, because one of the requirements for an adjustment of status under Section 245 is that the alien be admissible into the United States, the "purely political offense" provisions also serve to remove a disqualification that would otherwise apply to aliens convicted of political offenses. Thus, in this case, any determination that petitioner's offenses were "purely political," and hence that he was not excludable based on those convictions, would only eliminate a bar to petiitoner's legal eligibility for adjustment of status; such a determination would not bear on the discretionary denial of the relief he sought. Contrary to the premise of petitioner's contention, it is illogical to assume—and petitioner has cited nothing in the language, history, or purpose of the Act to demonstrate that it was Congress's intention—that a consideration that does not constitute an absolute legal preclusion to relief from deportation cannot, by that very fact, be taken into account by the INS in deciding whether to grant or deny such relief in the exercise of its discretion. See *Jain* v. *INS*, 612 F.2d 683 (2d Cir. 1979), cert. denied, 446 U.S. 937 (1980), and cases cited therein.

b. In addition, petitioner's argument ignores the numerous considerations that, entirely apart from his

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supra), the BIA (see pages 12-13, *supra*), and the court of appeals (see pages 14-15, *supra*), the finding that petitioner did not prove a well-founded fear of persecution is correct and justifies the denial of his request for withholding of deportation.

offenses in the Republic of Ireland, amply justify the denial of his requests for discretionary relief. Petitioner's characterization that "[t]he Immigration Judge, Board of Immigration Appeals, and Court of Appeals all relied almost exclusively on [his] conduct in Ireland as the basis for denying discretionary relief from deportation" (Pet. 18) is flatly contradicted by the record in this case.[16]

The bases for the decisions below have previously been described (see pages 8-15, *supra*). The following are among the reasons found by the immigration judge, the BIA, and the court of appeals for the denial of discretionary relief to petitioner (Pet. App. A3-A4; Pet. Supp. App. A15-A16, A44-A45): petitioner's fraudulent entry into the United States by means of a false passport and false name; his deceitful obtaining of a visitor's visa through lies about his identity and his purpose for coming to the United States; petitioner's deliberate overstay past the time permitted under the visa; the fact that petitioner was never a bona fide visitor to the United States and had no meaningful ties to this country; petitioner's failure to seek asylum prior to his arrest by the INS; his refusal to cooperate with the INS once he had been apprehended; and the detrimental impact that such relief to petitioner would have on our relations with Great Britain and the Republic of Ireland. As the court of appeals correctly concluded (Pet. App. A4, A6), these factors "support the denial of discretionary relief. * * * [M]any factors other

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[16] Petitioner has not contested the determination that he is subject to deportation for violating the immigration laws of the United States. Thus, the only question is whether the INS abused its discretion in rejecting petitioner's claims for discretionary relief.

than petitioner's convictions * * * warranted an exercise of discretion adverse to petitioner." [17]

c. Finally, the immigration judge and the court of appeals properly found that petitioner's convictions in the Republic of Ireland were not for "purely political offenses" within the meaning of Section 212 (a)(9) and (10) of the Act, 8 U.S.C. 1182(a)(9) and (10). Petitioner's crimes involved the Republic of Ireland, not Northern Ireland, and therefore his violation of the Republic's laws, arising from the PIRA's conflict with Northern Ireland, was not "political" (Pet. App. A5-A6; Pet. Supp. App. A27 & n.7). Furthermore, petitioner's statement that his actions had a political motivation does not convert into purely political offenses his admitted involvement in the manufacture and supply of explosives to be used for terrorism (R. 1022, 1046). See Pet. Supp. App. A25-A27; *Eain* v. *Wilkes*, 641 F.2d 504, 518, 520-521 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Finally, as the court of appeals explained in holding that petitioner had not established a well-founded fear of persecution in the Republic of Ireland (Pet. App. A8):

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[17] Indeed, neither the immigration judge nor the court of appeals relied on petitioner's convictions in the Republic of Ireland in holding that discretionary relief was inappropriate. To be sure, the BIA adverted to those convictions (Pet. Supp. App. A44) in "conclud[ing] that [petitioner] does not merit the favorable exercise of discretion" (*id.* at A45). But the Board also cited numerous other considerations to support its ruling that "[t]he immigration judge properly denied the discretionary applications for * * * relief" (*ibid.*); its references to petitioner's convictions, even assuming (contrary to our opening argument, see pages 16-17, *supra*) them to be outside the proper scope of the exercise of discretion, do not indicate an abuse of discretion in light of the additional reasons justifying the denial of relief to petitioner.

> The Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes. The illegal possession of explosives and firearms presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be. The nonpolitical nature of the Irish Government's interest and the serious nature of the crime removes prosecution and punishment for these offenses from the realms of political persecution.

2. Petitioner also contends (Pet. 19-22) that the recusal of Judge Hupp deprived him of a fair deportation proceeding and that his request for discovery and a hearing on the recusal issue was erroneously denied. The court of appeals correctly concluded (Pet. App. A10) that this contention is "so lacking in substance as to merit no discussion."

The issue of Judge Hupp's recusal was unrelated to the questions of petitioner's deportability [18] or his applications for discretionary relief.[19] Thus, this issue does not, contrary to petitioner's assertion, have any bearing on the case "against him" (Pet. 20). Furthermore, as the Board of Immigration Appeals noted (Pet. Supp. App. A53), petitioner's claim of prejudicial error in the decision of Judge Lyons is no "longer relevant, because of [the BIA's] independent review of the evidence on appeal." Nor does petitioner either deny his unimpaired opportunity to present evidence on his own behalf or contest the

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[18] In fact petitioner had already conceded one charge of deportability (R. 1111).

[19] At the time of Judge Hupp's recusal, petitioner's only pending application for relief related to an adjustment of status. His remaining requests for relief were filed thereafter and were decided by Judge Lyons.

"extensive evidence in the record supporting" Judge Lyons' decision (*ibid.*). In these circumstances, the issue of the recusal of Judge Hupp is immaterial to petitioner's deportation, and Judge Lyons did not err in ruling that petitioner was not entitled to discovery or a hearing on the matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421833 934